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Chew Wai Keong v Public Prosecutor

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HIGH COURT (IPOH) — CRIMINAL APPLICATION NO 44–10 OF 2010
TEO SAY ENG JC
22 OCTOBER 2010

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Constitutional Law — Attorney General — Power to institute, conduct or discontinue proceedings — Courts' inherent powers to strike out charges to prevent injustice or abuse of process of court — Whether tantamount to usurping attorney general's functions — Federal Constitution art 145(3)

D

Criminal Procedure — Abuse of process — Court's inherent power to curb abuse of process — Application to strike out criminal proceedings — Whether there was abuse of process of court — Whether charges preferred in bad faith or mala fide

E

Criminal Procedure — Charge — Application to strike out — Whether charges groundless, oppressive and abuse of process of court — Whether charges preferred in bad faith or mala fide — Courts' powers to acquit and discharge without hearing evidence — Scope of inherent powers of High Court to prevent injustice or abuse of process of court

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Criminal Procedure — Jurisdiction of court — Inherent jurisdiction — Scope of inherent powers of High Court to prevent injustice or abuse of process of court — Whether court has inherent jurisdiction to strike out charges

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Both the accused were initially charged under s 3 of the Kidnapping Act 1961 ('the Act') read together with s 34 of the Penal Code ('Code') for having kidnapped one Teh Wai Toong ('Teh'). The prosecution subsequently instituted an additional charge under s 302 of the Code read together with s 34 of the Penal Code against both the accused persons for the murder of the said Teh. The first accused ('applicant') applied by way of motion under s 173(g) of the Criminal Procedure Code ('CPC') as well as under the inherent powers of the court for an order of acquittal and discharge in respect of or for striking out the charge under s 3 of the Act. The main ground of the application was that the charge under s 3 of the Act was groundless, vexatious and an abuse of the process of court based on the following reasons: (i) that the prosecution could not succeed in proving the charge under the Act since the victim had passed

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away; and (ii) that since the applicant was already charged with murder, the charge under the Act was redundant. A

Held, dismissing the application:

(1) The courts have powers to acquit and discharge without hearing evidence only under two circumstances, namely: (i) after hearing all the evidence which the prosecution has to offer; and (ii) where the prosecution has declined to prosecute the accused further under s 254 of the CPC (see para 13 & 13(a)–(b)). B

(2) Section 173(g) of the CPC could not be invoked because it is a power given to the subordinate courts in summary proceedings in dealing with charges which are groundless and the types of order which the subordinate courts may grant are orders of discharge not amounting to an acquittal (see para 15 & 15(a)–(b)). C

(3) The scope of the inherent powers of the High Courts is very limited. The exercise of such inherent powers to prevent injustice or an abuse of the process of the court are subject to the following conditions: (a) the inherent powers cannot be invoked to override an express provision of law or when there is another remedy available; and (b) such inherent powers are strictly confined to procedural matters only. The court has the inherent powers to set aside and quash a charge which is mala fide, oppressive or an abuse of the process or when there is a miscarriage of justice. Such inherent powers must be exercised with the greatest caution (see paras 22, 22(a)–(b) & 23). D E F

(4) Under the Federal Constitution ('Constitution') it is the prerogative of the attorney general ('AG') whether or not to charge a person with an offence. In this case consent to prosecute had been given. Whether or not the prosecution would succeed depended on the evidence it had to offer. It was premature for the defence to argue that the prosecution was unlikely to succeed due to lack of certain evidence. Similarly, it is the prerogative of the AG to institute one or more charges against an accused person based on the same facts. There was no evidence that the AG acted mala fide against the accused. Thus, any interference by the court with the AG's discretion would tantamount to usurping his functions and would conlict with art 145(3) of the Federal Constitution (see para 23(a)). G H

(5) There was another remedy available, that is, the applicant could make representation to the AG for the withdrawal of the kidnapping charge on the ground that the victim had passed away or that the accused had also been charged with murder based on the same facts. It was entirely for the AG alone to decide whether or not to enter a nolle prosequi against the accused (see para 23(b)). I

A **[Bahasa Malaysia summary**

Kedua-dua tertuduh pada mulanya dituduh di bawah s 3 Akta Colek 1961 ('Akta') dibaca bersama s 34 Kanun Keseksaan ('Kanun') kerana menculik Teh Wai Toong ('Teh'). Pihak pendakwaan kemudiannya mengenakan tuduhan tambahan di bawah s 302 Kanun dibaca bersama s 34 Kanun terhadap
B kedua-dua tertuduh kerana membunuh Teh. Tertuduh pertama ('pemohon') memohon melalui usul di bawah s 173(g) Kanun Prosedur Jenayah ('KPJ') dan juga di bawah kuasa sedia ada mahkamah untuk perintah dibebaskan dan dilepaskan berkaitan atau untuk membatalkan tuduhan di bawah s 3 Akta. Alasan utama permohonan adalah bahawa tuduhan di bawah s 3 Akta tidak
C berasas, menyusahkan dan merupakan penyalahgunaan proses mahkamah berdasarkan alasan-alasan berikut: (i) bahawa pihak pendakwaan tidak akan berjaya dalam membuktikan tuduhan di bawah Akta memandangkan mangsa telah meninggal dunia; dan (ii) bahawa memandangkan pemohon telah
D dituduh membunuh, tuduhan di bawah Akta tidak diperlukan.

Diputuskan, menolak permohonan:

(1) Mahkamah mempunyai kuasa untuk membebaskan dan melepaskan tanpa mendengar keterangan hanya di bawah dua keadaan, iaitu: (i)
E selepas mendengar kesemua keterangan yang mana akan diberikan oleh pihak pendakwaan; dan (ii) di mana pihak pendakwaan telah menolak untuk mendakwa tertuduh selanjutnya di bawah s 254 KPJ (lihat perenggan 13 & 13(a)–(b)).

F (2) Seksyen 173(g) KPJ tidak dapat dibangkitkan kerana ia adalah kuasa yang diberikan kepada mahkamah rendah di dalam prosiding terus dalam berurusan dengan kesemua tuduhan yang mana tidak berasas dan jenis perintah yang mana mahkamah rendah mungkin benarkan adalah perintah pelepasan tidak terjumlah kepada pembebasan (lihat
G perenggan 15 & 15(a)–(b)).

(3) Skop kuasa sedia ada Mahkamah-Mahkamah Tinggi adalah terhad. Pelaksanaan kuasa sedia ada sebegitu untuk menghalang ketidakadilan atau penyalahgunaan proses mahkamah adalah tertakluk kepada syarat-syarat berikut: (a) kuasa sedia ada tidak boleh dibangkitkan
H untuk mengatasi peruntukan undang-undang nyata atau apabila terdapat remedi lain yang sedia ada; dan (b) kuasa sedia ada sebegitu secara ketat terlingkung hanya kepada perkara prosedur. Mahkamah mempunyai kuasa sedia ada untuk mengetepikan dan membatalkan tuduhan yang mana adalah mala fide, penindasan atau
I penyalahgunaan proses mahkamah atau apabila terdapat ketidakadilan. Kuasa sedia ada sebegitu mesti dilaksanakan dengan berhati-hati (lihat perenggan 22, 22(a)–(b) & 23).

(4) Di bawah Perlembagaan Persekutuan ('Perlembagaan') ia adalah prerogatif peguam negara sama ada untuk mendakwa seseorang dengan kesalahan. Dalam kes ini izin untuk mendakwa telah diberikan. Sama ada pendakwaan akan berjaya bergantung ke atas keterangan yang akan diberikannya. Adalah pramatang bagi pembelaan untuk berhujah bahawa pihak pendakwaan tidak akan berjaya kerana kekurangan keterangan tertentu. Begitu juga, ia adalah prerogatif peguam negara untuk memulakan satu atau tuduhan yang lebih terhadap tertuduh berdasarkan fakta yang sama. Tidak terdapat keterangan bahawa peguam negara bertindak mala fide terhadap tertuduh. Oleh itu, apa-apa campur tangan oleh mahkamah dengan arahan peguam negara akan merampas fungsi-fungsinya dan akan bercanggah dengan perkara 145(3) Perlembagaan (lihat perenggan 23(a)).

(5) Terdapat remedi lain yang sedia ada, iaitu, pemohon boleh membuat representasi kepada peguam negara untuk penarikan balik tuduhan menculik atas alasan bahawa mangsa telah meninggal dunia atau bahawa tertuduh juga telah dituduh membunuh berdasarkan fakta yang sama. Ia adalah sepenuhnya bagi peguam negara untuk memutuskan sama ada untuk memasukkan nolle prosequi terhadap tertuduh (lihat perenggan 23(b)).]

Notes

For a case on application to strike out charge, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1071.

For cases on abuse of process generally, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1–2.

For cases on attorney general generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1878–1885.

For cases on juridiction of court generally, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2269–2411.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Connelly v Director of Public Prosecutions [1964] 2 All ER 401, HL (refd)

Dato' Seri Anwar bin Ibrahim v PP [2010] 6 MLJ 533, CA (refd)

Dato' Seri Anwar Ibrahim v PP [2010] 7 CLJ 397, FC (refd)

Director of Public Prosecutions v Humphrys [1976] 2 All ER 497, HL (refd)

Karpal Singh & Anor v PP [1991] 2 MLJ 544; [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183, FC (refd)

Metropolitan Bank, Ltd, and another v Pooley [1881–85] All ER Rep 949, HL (refd)

A *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586, FC (refd)
PP v Ini Abong and other trials [2008] 8 MLJ 106; [2009] 1 CLJ 526, HC (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100; [1986] CLJ (Rep) 232, SC (refd)

B **Legislation referred to**
Courts of Judicature Act 1964 s 25(1)
Criminal Procedure Code ss 4, 5, 173(g), 254
Federal Constitution arts 121, 145(3)
Kidnapping Act 1961 s 3
C Penal Code s 302

Ramanaidu a/l Golla Somulu (R Naidu & Partners) for the applicant.
Julia Ibrahim (Deputy Public Prosecutor, State Attorney General's Chambers) for the prosecution.

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Teo Say Eng JC:

[1] The first and second accused were initially charged under s 3 of the
E Kidnapping Act 1961 as follows:

> Bahawa kamu bersama-sama pada 20 April 2007, jam lebih kurang 10.00 malam, di rumah No. 2, Laluan Bercham Utara 17, Taman Utama, Ipoh di dalam Negeri Perak, telah mencolek TEH WAI TOONG, KPT No. 761221–08–5981. Oleh yang
F demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 3 Akta Colek 1961 (Pindaan 1997) dibaca bersama seksyen 34 Kanun Keseksaan.

[2] The prosecution had subsequently instituted an additional charge under
G s 302 of the Penal Code against both the accused persons as follows:

> Bahawa kamu bersama-sama pada diantara 26 April 207 jam lebih kurang 2.30 petang sehingga 29 April 2007 jam lebih kurang 2.30 petang, di tempat buang sampah KM2, Jalan Felda Lasah, Lintang, dalam Daerah Sg. Siput (U), dalam
H Negeri Perak Darul Ridzuan, telah melakukan pembunuhan iaitu menyebabkan kematian ke atas TEH WAI TOONG, K/P No: 761221–08–5981. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

I **[3]** The first accused ('the applicant') then filed an application before the High Court by way of motion under s 173(g) of the Criminal Procedure Code as well as under the inherent powers of the court for an order of acquittal and discharge in respect of or for striking out the charge under s 3 of the Kidnapping Act 1961.

[4] The application was supported by an affidavit affirmed by Mr Ramanaidu a/l Golla Somulu. The main ground of the application as stated in the notice of motion was that the charge under s 3 of the Kidnapping Act 1961 was groundless, vexatious and an abuse of the process of court based on the following reasons:

(a) the prosecution could not succeed in proving the charge under the Kidnapping Act 1961 since the victim had passed away on 29 April 2007; and

(b) since the applicant is already charged with murder, the charge under the Kidnapping Act is redundant.

[5] Learned counsel for the applicant submits that the High Court has powers under s 173(g) of the Criminal Procedure Code as well as under the inherent powers to acquit and discharge the applicant from or to strike out the kidnapping charge in order to arrest a wrong at limine at the earliest opportunity.

[6] He cited at least five cases in support of his contentions, namely:

(a) *Public Prosecutor v Ini Abong and other trials* [2008] 8 MLJ 106; [2009] 1 CLJ 526;

(b) *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 2 CLJ 1458;

(c) *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401;

(d) *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497; and

(e) *Metropolitan Bank, Ltd, and another v Pooley* [1881-85] All ER Rep 949.

[7] He also drew the court's attention to s 25(1) of the Courts of Judicature Act 1964 as well as s 4 and s 5 of the Criminal Procedure Code to support his contentions that the court has the inherent powers to arrest a wrong.

[8] The prosecution objected strongly to the application made by the applicant. An affidavit in reply had been filed in support of its objections.

[9] The learned deputy public prosecutor submits that the application was frivolous, without merits, baseless and an abuse of the process of the court based on the following grounds:

(a) There is no provision in the Criminal Procedure Code for striking out proceedings or acquittal without hearing all the evidence which the prosecution has to offer.

(b) Section 173(g) of the Criminal Procedure Code is not applicable to the proceedings in the High Court.

(c) It is the prerogative of the public prosecutor to institute, conduct or discontinue any proceedings for an offence against any person: art 145(3) of the Federal Constitution. Such a discretion cannot be challenged and substituted by that of the court's: *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 1 CLJ (Rep) 183.

(d) Whether or not the prosecution could succeed in proving the kidnapping charge can only be determined after the court has heard all the witnesses. The prosecution cited the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 6 MLJ 533 (Court of Appeal, Criminal Appeal No W-05–323 of 2009) to support its contention.

[10] The first issue for determination in hearing this application is to ascertain the types of order sought by the applicant. The applicant was applying to this court for an order of acquittal and discharge in respect of or for striking out the charge of kidnapping against him.

[11] I notice that the phraseology 'striking out' cannot be found in our Criminal Procedure Code. In fact what the applicant was praying was for an order of acquittal and discharge.

[12] The issue as to whether the courts have powers to grant an order of acquittal and discharge without hearing any evidence had been thoroughly canvassed by our courts in the past.

[13] The principles laid down by case law are that our courts have powers to acquit and discharge without hearing evidence only under two circumstances, namely:

(a) After hearing all the evidence which the prosecution has to offer: *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100; [1986] CLJ (Rep) 232 (SC).

(b) Where the prosecution has declined to prosecute the accused further under s 254 of the Criminal Procedure Code which reads:

> Public Prosecutor may decline to prosecute further at any stage
>
> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.
>
> (2) At any stage of any trial before a Sessions Court or a Magistrate's Court

before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

(3) Such discharge shall not amount to an acquittal unless the Court so directs.

[14] Having ascertained the types of order and under what circumstances the High Court may grant, the next issue for determination is whether the High Court has powers under s 173(g) of the Criminal Procedure Code as well as under the inherent powers to acquit and discharge the applicant from the charge of kidnapping for the reasons furnished by learned counsel for the applicant.

[15] First and foremost I am of the view that s 173(g) of the Criminal Procedure Code cannot be invoked for two reasons:

(a) it is a power given to the subordinate courts in summary proceedings in dealing with charges which are groundless; and

(b) the types of order which the subordinate courts may grant are orders of discharge not amounting to an acquittal.

[16] The only issue left for determination is whether the High Court has the inherent powers to acquit and discharge the accused from the kidnapping charge or to strike out the said charge against him on the grounds raised by the defence.

[17] In determining whether the High Court has the inherent powers to acquit and discharge the accused from or to strike out the kidnapping charge on the grounds raised by the defence, one must, first and foremost, understand what the term 'inherent powers' means. Her Ladyship Heliliah Mohd Yusof, Federal Court judge in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 7 CLJ 397 at p 474 was trying to explain the meaning of 'inherent jurisdiction'. Her Ladyship had relied upon the concise *Oxford Dictionary* to explain the word 'inherent' to mean existing in something especially as a permanent or characteristic attribute. She was then of the view that inherent jurisdiction is deemed to be part of the court's power to do all the things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. She then concludes that inherent power is found within the very nature of a court of law, unlike power conferred by statute. The meaning of 'inherent powers' has also been dealt with by Sir Jack IH Jacob in his article entitled *The Inherent Jurisdiction of the Court* [1970] CLP 23 where the learned author said:

> ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent' ... the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute ... The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law ...

[18] From the exposition of the meaning of 'inherent powers' cited above, one may conclude that inherent powers do not derive from statute but are intrinsic in a superior court which are necessary to prevent injustice or its process being obstructed or abused.

[19] In other words the High Courts derive their inherent powers not from the statute but from their nature as superior courts established under art 121 of the Federal Constitution.

[20] The fact that the High Courts have inherent powers similar to the courts in England had been recognised by our Federal Court in numerous cases. For instance, the Federal Court has reaffirmed that the High Court has inherent jurisdiction to set aside its own order where it can be proved to be null and void on the ground of illegality or lack of jurisdiction:

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75 (FC); *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 (FC).

[21] The inherent powers of the High Courts have been extended to criminal cases by our then Supreme Court in *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544 at p 549; [1991] 1 CLJ (Rep) 183 at p 192 when LP Abdul Hamid Omar was of the view that the High Court may invoke such prerogative powers in rare instance to do justice to the accused.

[22] However, the scope of such inherent powers of the High Courts is very limited. A study of the past judicial precedents reveals that the exercise of such inherent powers to prevent injustice or an abuse of the process of the court are subject to the following conditions:

(a) The inherent powers apparently cannot be invoked to override an express provision of law or when there is another remedy available: *Karpal*'s case.

(b) Such inherent powers are strictly confined to procedural matters only: *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 7 CLJ 397 at p 406.

[23] Based on the authorities cited, I agree with learned counsel for the applicant that this court has the inherent powers to set aside and quash a charge which is mala fide, oppressive or an abuse of the process of the court or when there is a miscarriage of justice. But such inherent powers must be exercised with the greatest caution. Having considered the grounds raised by the applicant that: (1) the prosecution was unlikely to succeed in proving its case against the accused due to the reason that the victim had passed away; and (2) the charge on kidnapping was redundant as the applicant had been charged with murder, I am not inclined to exercise the inherent powers to acquit and discharge the accused from the kidnapping charge or to strike out the charge against him for the following reasons:

(a) Inherent powers cannot be invoked to override an express provision of law. The court must be careful that any exercise of the inherent power is not in conflict with the intention of the Legislature. Unlike the UK, we have our Federal Constitution which is the supreme law of the land which has conferred sole prerogative powers on the attorney general to institute, conduct or discontinue any proceedings for an offence: see art 145(3) of the Federal Constitution and our Criminal Procedure Code which was intended to be the exhaustive pronouncement of the law relating to criminal procedure in Malaysia. It is the prerogative of the attorney general whether or not to charge a person with an offence. It is the attorney general who knows best the nature and the amount of evidence the police has gathered. Usually an instruction to charge will be given only if there is sufficient evidence gathered. In this case consent to prosecute has been given, meaning that the prosecution has gathered sufficient evidence to prove its case in court. Whether or not the prosecution would succeed depends on the evidence it has to offer. It is premature for the defence to argue that the prosecution is unlikely to succeed due to lack of certain evidence. Similarly, it is the prerogative of the attorney general to institute one or more charges against an accused person based on the same facts. The discretion vested in him is unfeltered and cannot be challenged and substituted by that of the court's unless it is proven that the discretion was made mala fide: *Karpal Singh*'s case. There is no evidence that the attorney general has acted mala fide against the accused. In the circumstances any interference by the court with the discretion of the attorney general is tantamount to usurping his functions and is in conflict with art 145(3) of the Federal Constitution.

(b) In this case, it would appear that there is another remedy available, that is, it is for the applicant to make representation to the attorney general for the withdrawal of the kidnapping charge on the ground that the victim had passed away or the accused had also been charged with

murder based on the same facts. It is a matter entirely for the attorney general alone to decide whether or not to enter a nolle prosequi against the accused.

(c) The inherent powers sought is to strike out a charge against the accused which is strictly not a procedural matter.

[24] For the above reasons I dismiss the application.

Application dismissed.

Reported by Kanesh Sundrum